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No. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

GARY X. NELSON,

Petitioner,

-against-

WALTER D. ZANT, Warden,
Georgia Diagnostic & Classification
Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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J82

QUESTION PRESENTED FOR REVIEW

Whether Petitioner was deprived of his constitutional rights to a capital conviction based only on the evidence of record, to a capital conviction based on sufficient evidence of record, and to meaningful appellate review in capital cases where (a) on direct appeal, the Georgia Supreme Court affirmed his convictions and death sentence on the basis of "evidence" that is concededly not in the trial record; (b) the state habeas court then reversed his convictions because there was insufficient evidence of record; and (c) on a subsequent appeal by the State, the Georgia Supreme Court, conceding that it had misread the trial record on direct appeal, nevertheless reinstated Petitioner's convictions and death sentence in a manner that is both unsupported by the evidence and inconsistent with its earlier decision?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Introduction	2
B. Procedural History	4
C. Statement of Facts	5
D. How The Federal Questions Were Raised And Decided Below	12
REASONS FOR GRANTING THE WRIT	13
THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO A CAPITAL CONVICTION BASED ONLY ON THE EVIDENCE OF RECORD, TO A CAPITAL CONVICTION BASED ON SUFFICIENT EVIDENCE OF RECORD, AND TO MEANINGFUL APPELLATE REVIEW IN CAPITAL CASES WHERE (A) ON DIRECT APPEAL, THE GEORGIA SUPREME COURT AFFIRMED HIS CONVICTIONS AND DEATH SENTENCE ON THE BASIS OF "EVIDENCE" THAT IS CONCEDEDLY NOT IN THE TRIAL RECORD; (B) THE STATE HABEAS COURT THEN REVERSED HIS CONVICTIONS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF RECORD; AND (C) ON A SUBSEQUENT APPEAL BY THE STATE, THE GEORGIA SUPREME COURT, CONCEDING THAT IT HAD MISREAD THE TRIAL RECORD ON DIRECT APPEAL, NEVERTHELESS REINSTATED PETITIONER'S CONVICTIONS AND DEATH SENTENCE IN A MANNER THAT IS BOTH UNSUPPORTED BY THE EVIDENCE AND INCONSISTENT WITH ITS EARLIER DECISION.	
I. PETITIONER WAS DENIED DUE PROCESS BY A CAPITAL CONVICTION BASED ON INSUFFICIENT EVIDENCE OF RECORD	13
A. It Was Necessary for The State To Exclude Swinton As A Suspect In Order To Establish Petitioner's Guilt Beyond A Reasonable Doubt	14
B. The Evidence Of Record Was Insufficient To Exclude Swinton And To Convict Petitioner	16

Page

1. Swinton "Also Had Access To the Murder Weapon" 18

2. Even If Mr. Nelson Was Present When Sabrina Williams Last Saw The Victim, That Would Not Be Sufficient To Exclude Swinton And Convict Petitioner 19

3. The Fact That Swinton Had Moved Out Of The House Was Not Sufficient To Exclude Him 21

4. The Evidence Relating to Nelson's Hair Did Not Exclude Swinton 23

II. PETITIONER'S CONVICTIONS AND DEATH SENTENCE BASED ON INSUFFICIENT EVIDENCE OF RECORD, THE AFFIRMANCE ON DIRECT APPEAL IN NELSON I BASED ON MATTERS OUTSIDE THE RECORD, AND THE INCONSISTENT RULING ON HABEAS APPEAL IN NELSON II VIOLATED "THE MOST FUNDAMENTAL CONCEPTS OF DUE PROCESS"..... 24

TABLE OF AUTHORITIES

Cases:	Page
Ashe v. Swenson, 397 U.S. 436 (1970)	19,27
Beck v. Alabama, 447 U.S. 625 (1980)	4,28
Davis v. Alaska, 415 U.S. 308 (1974)	26
Dobbert v. Florida, 432 U.S. 282 (1977)	25
Douglas v. Alabama, 380 U.S. 415 (1965)	26
Eddings v. Oklahoma, 455 U.S. 104 (1982)	28
Enmund v. Florida, ____ U.S. ____, 102 S. Ct. 3368 (1982)	25
Furman v. Georgia, 408 U.S. 238 (1972)	24,28
Gardner v. Florida, 430 U.S. 349 (1977)	25, 26, 28
Godfrey v. Georgia, 446 U.S. 420 (1980)	26,28
Gregg v. Georgia, 428 U.S. 153 (1976)	25,27,28
Griffith v. State, 124 Ga. App. 505, 184 S.E.2d 477 (1971)	15
Jackson v. Virginia, 443 U.S. 307 (1979)	13-14,18
Lockett v. Ohio, 438 U.S. 586 (1978)	28
Mullaney v. Wilbur, 421 U.S. 684 (1975)	16
Nelson v. State, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 454 U.S. 882 (1981) ("Nelson I")	passim
Pointer v. Texas, 380 U.S. 400 (1965)	26
Proffitt v. Florida, 428 U.S. 242 (1976)	25,27-28
Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968)	19,27
Turner v. Louisiana, 379 U.S. 466 (1965)	26
United States v. Oppenheimer, 242 U.S. 85 (1916)	13,27
Vachon v. New Hampshire, 414 U.S. 478 (1974)	15
In re Winship, 397 U.S. 358 (1970)	14
Woodson v. North Carolina, 428 U.S. 280 (1976)	28
Zant v. Nelson, 250 Ga. 152, 296 S.E.2d 590 (1982) ("Nelson II")	passim

TABLE OF AUTHORITIES (Continued)

	Page
Constitutional Provisions:	
U.S. Const. amend. V	27
U.S. Const. amend. VI	26
U.S. Const. amend. VIII	14 and passim
U.S. Const. amend. XIV	14 and passim
Statutes:	
Ga. Code § 9-11-60(h)	19, 27
Ga. Code § 24-4-5	16
Ga. Code § 24-4-6	16
Other Authorities	
Model Penal Code § 210.6(1)(f)(Proposed Official Draft 1962)	14

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PETITION FOR A WRIT OF
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COURT OF THE STATE OF GEORGIA

Petitioner Gary X. Nelson respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Georgia reinstating Petitioner's convictions and death sentence after they had been reversed by the state habeas court.

OPINIONS BELOW

The Georgia Supreme Court has issued two conflicting opinions with respect to Petitioner's convictions and death sentence. The first opinion on direct appeal affirming Petitioner's convictions and death sentence on the basis of "evidence" that is not in the trial record is reported as

Nelson v. State, 247 Ga. 172, 274 S.E.2d 317, cert. denied, 445 U.S. 882 (1981) ("Nelson I"), attached as Appendix A. The June 3, 1982 order of the Superior Court of Butts County, Georgia ("the June 3 Order") granting Petitioner habeas relief and reversing his convictions based on insufficient evidence of record is attached as Appendix B. The more recent decision of the Georgia Supreme Court reversing the June 3 Order and reinstating Petitioner's convictions and death sentence following an appeal by the State is reported as Zant v. Nelson, 250 Ga. 152, 296 S.E.2d 590 (1982) ("Nelson II"), attached as Appendix C.

JURISDICTION

The judgment of the Supreme Court of Georgia in Nelson II was entered on October 28, 1982. This petition for certiorari was filed within ninety days after the entry of judgment pursuant to Rule 20.2 of the Supreme Court Rules and 28 United States Code section 2101(c). The jurisdiction of this Court is invoked under 28 United States Code section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Georgia Code sections 9-11-60(h), 24-4-5, and 24-4-6, are set forth in Appendix D.

STATEMENT OF THE CASE

A. Introduction

The Georgia Supreme Court on direct appeal in Nelson I affirmed Petitioner Nelson's convictions and death sentence for

rape, sodomy and murder based on a serious misreading of the trial record. Given the State's circumstantial evidence, the central issue at trial was the identity of the perpetrator of the crimes. After correctly holding that, for the State to satisfy its burden of proving Mr. Nelson's guilt beyond a reasonable doubt at trial, "it was necessary for the state to exclude the possibility that [Alphonso] Swinton [Petitioner's one-time roommate], who also had access to the murder weapon, could have committed the murder" (Nelson I, 247 Ga. at 178, 274 S.E.2d at 323), the Georgia Supreme Court mistakenly asserted that the State had introduced "proof that the hair found on the victim could have come from [Petitioner's] arm, but could not have come from Swinton's arm" (id. at 177, 274 S.E.2d at 323 (emphasis added)). Based solely on that mistaken reading of the record, the Court concluded that the State had satisfied its burden of eliminating Swinton as a suspect.

There is no evidence whatsoever in the record that the hair found on the victim's body could not have come from Alphonso Swinton.

Consequently, the habeas court reversed Mr. Nelson's convictions because:

> [T]he Supreme Court used as a basis for affirming Petitioner's conviction upon circumstantial evidence a finding of evidence that was never presented to the jury. . . .
>
> This Court agrees with the [Georgia] Supreme Court that without the evidence to exclude Swinton, the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia standard of proof beyond a reasonable doubt.

June 3 Order (App. B) at 4 (footnote omitted).

In Nelson II, the Georgia Supreme Court confessed that it had misread the trial record on direct appeal in Nelson I:

> The [alleged] tests comparing Swinton's hair with that found on the victim were said to show that the hair on the victim did not come from Swinton. These [alleged] results were never introduced into evidence; instead, the record shows only that remarks concerning those [alleged] tests were made by the DA, defense counsel, and the judge during a luncheon recess outside the presence of the jury. . . .
>
> This Court acknowledges that in . . . our opinion on Nelson's direct appeal [Nelson I], . . . we erroneously recognized as admitted the [alleged] tests concerning the comparison between the hair found on the victim and that taken from Swinton's arm. These [alleged] test results were never in fact admitted into evidence.

Nelson II, 250 Ga. at 153, 296 S.E. 2d at 591.*

Thus, although the Georgia Supreme Court, the state habeas court, the trial court and the prosecutor at trial all recognized that it was necessary for the State to exclude Alphonso Swinton as a suspect as part of the State's case in chief against Petitioner, the prosecutor in fact failed to introduce the only evidence that might have been sufficient to exclude Swinton. The Georgia Supreme Court nevertheless reversed the judgment of the habeas court and reinstated Mr. Nelson's convictions in Nelson II, in a transparent and unsuccessful attempt to evade the necessary consequences of its own decision in Nelson I.

B. Procedural History

After at least two previous grand juries had failed to indict, and 20 months after the crimes were committed, Mr. Nelson was finally indicted for the offenses of murder (Ga. Code Ann. § 26-1101), rape (Ga. Code Ann. § 26-2001), and aggravated sodomy (Ga. Code Ann. § 26-200) of Valerie L. Armstrong.

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* The relevant portion of the trial record is quoted infra at pp. 11-12.

On February 29, 1980, after a jury trial before Judge Frank S. Cheatham, Jr., in the Superior Court of Chatham County, Georgia, Mr. Nelson was found guilty of all charges. On March 14, 1980, the trial court sentenced Mr. Nelson to death on the murder conviction (see Ga. Code Ann. § 27-2534.1(b)(7)), and to two consecutive life sentences on the rape and sodomy convictions.

On direct appeal in Nelson I, Mr. Nelson's convictions were affirmed on the basis of evidence that was not in the record. On October 5, 1981, this Court denied a petition for a writ of certiorari, with Justices Brennan and Marshall dissenting. 454 U.S. 882 (1981).

Mr. Nelson then filed a petition for a writ of habeas corpus containing numerous claims for relief in the Superior Court of Butts County, Georgia. On February 25, 1982, in response to a joint motion by Mr. Nelson and the State, the habeas court directed that Mr. Nelson's claim for relief under count one of the habeas corpus petition -- the count addressing the Swinton issue -- be severed, heard and determined prior to discovery and a hearing on the remaining counts. After receiving briefs and conducting a hearing on that count, Judge R. Alex Crumbley entered the order granting the habeas petition and reversing the convictions for rape, sodomy and murder on June 3, 1982.

The State appealed. In Nelson II, the Georgia Supreme Court reversed the judgment of the habeas court.

C. Statement Of Facts

The Georgia Supreme Court in both Nelson I and II, the state habeas court, the trial court and the prosecutor all concluded, and it is evident from the facts introduced at trial, that it was necessary for the State to exclude the reasonable

hypothesis that Alphonso Swinton committed the crimes in order for the State to prove that Petitioner Nelson was guilty beyond a reasonable doubt.

Alphonso Swinton and Gary X. Nelson shared a house on 53rd Street in Savannah, Georgia, about half a block away from the victim's house. T. 180-82.* Swinton initially rented the house. T. 426-27. Mr. Nelson moved in later and shared the house with Swinton for five to six months (T. 426), until late January 1978 (T. 346) when Swinton moved out (T. 426). Swinton, however, continued to frequent the house (T. 182, 347-48, 426-27), and the record itself demonstrates that he was seen there only a week before the victim disappeared. T. 426-27.

Six-year-old Valerie Armstrong disappeared on February 19, 1978. The police found her body in a ditch in a wooded field some distance from her home the following afternoon, raped, sodomized and dead of a stab wound. T. 232-33, 240, 261, 292-93.

The victim's stepfather, Ray McCray, had first noticed that she was missing on Sunday, February 19, around 7:00 p.m. T. 185-86. The family searched for her in the neighborhood (T. 186), and that evening the victim's sister asked Sabrina Williams (who was eight years old at the time of the crimes and ten years old at trial) if she had seen the victim. Sabrina did not say she had seen the victim that day. T. 309-10. Mr. McCray reported Valerie missing to the police around 10:30 p.m. T. 206, 214, 228-29.

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* The trial transcript is designated by a "T" followed by the page number.

Three days later, at a police interview, when Sabrina was "scared" (T. 322) and (according to the police officer who interviewed her) "very nervous because of her age" (T. 327), Sabrina for the first time said that she had gone to the store with the victim to buy some candy on February 19. T. 301-03, 325-26. Sabrina testified at trial that on the way back from the store the victim left Sabrina to go to what the victim referred to as her "uncle's house" to get money to buy candy. T. 304-05. Sabrina testified that that was "Al's house," referring to Alphonso Swinton. Id. According to prosecution witness Patricia Brown, Swinton's girlfriend, Swinton encouraged the neighborhood children to come around by leaving candy around the house. T. 353-54.

At a pretrial hearing on August 30, 1978 (T. 321), Sabrina testified that she saw the victim go into the back yard on February 19, but did not see anyone else:

> Question, "Whose back yard was she in?"
>
> Answer, "She was in Al's back yard."
>
> Question, "Was there anybody else in the back yard?"
>
> Answer, "I don't know. I ain't looked in the back yard."
>
> Question, "Did you see anybody before you left?"
>
> Answer, "No, I didn't look in there."
>
> Question, "Other than Valerie?"
>
> [Answer,] "No, nobody else."

T. 320. Sabrina changed her testimony at trial, where she testified that she saw a man in the backyard, dressed in black. T. 305.

Upon seeing Mr. Nelson at trial, however, Sabrina testified that he was not the man she claimed to have seen in the back yard. T. 324. She testified on three separate occasions at trial that she did not see that person in the courtroom. T. 312, 315, 321.

However, in an effort to impeach its own witness, the prosecution then introduced the fact that at the February 22 interview (when she was "scared" and "very nervous"), Sabrina had selected a picture as possibly representing the person in the backyard. She was not sure that the person in the picture was the person in the yard: "No, I wasn't sure, 'cause it might have been another person" (T. 314); "I really wasn't sure, but it looked like him" (T. 318); "I wasn't sure" (id.); "No, I wasn't sure." Id. Through the testimony of a police officer who had conducted the February 22 interview, the prosecution established that the picture was of Petitioner. T. 328.*

Mr. Nelson worked on his car in his backyard with the victim's father on Sunday afternoon, February 19. Michael Armstrong, the victim's brother, testified that he went to Mr. Nelson's house on February 19 at dusk to lend him a drop cord so that he could continue working on his car after dark.

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* Even disregarding Sabrina Williams' age and the inconsistencies in her identification testimony, the circumstances under which she is supposed to have seen Mr. Nelson in the backyard render her identification highly suspect. According to The Old Farmer's Almanac 38, 62 (1978), sunset in Savannah occurred at 6:20 p.m. on February 19, 1978. Although Sabrina testified that it was "almost dark" when she and the victim left Sabrina's grandmother's house to go to the store (T. 317), it was 7:10 p.m. when Sabrina left Valerie and entered her grandmother's house to watch The World of Walt Disney, which began at 7:00 p.m. and was already in progress. T. 307, 316. Therefore, it was completely dark by the time that Sabrina, from a vantage point on the opposite side of the street, is supposed to have been able to recognize Mr. Nelson as a man in the back yard of "Uncle Al's house."

Michael knocked on Petitioner's door but there was no answer. He looked in the backyard but there was nobody there. Michael returned home where he saw the victim in her own backyard with another girl. T. 221, 223, 225-27.

The police found a broken knife handle wrapped in masking tape and a blade about 15 to 17 feet from the victim's body. T. 247-48. The police pieced the knife together, photographed it for identification (T. 247, 263), and then removed the tape to search for fingerprints on the handle. T. 246, 259. The police found no fingerprints on the tape, handle, or blade. T. 260. The prosecution introduced no evidence that the knife matched the victim's wounds. It did, however, attempt to link the knife to Petitioner.

The only such affirmative evidence was the testimony of prosecution witness Patricia Brown, who had been Alphonso Swinton's girl friend for over twelve years and was Swinton's girlfriend at the time of trial. T. 345-46, 355. She testified that she had "visited" Alphonso Swinton when he was living in the house on 53rd Street through January 1978. T. 346-47. At trial two years after the crimes, Ms. Brown identified a photograph of the knife that the police had pieced together. She stated that the photograph resembled a knife -- which she recalled was not sharp -- that she had once used at the 53rd Street house to cut chicken for Swinton. T. 348-49.*

When asked to identify the last time she had seen the knife before the victim disappeared, Ms. Brown testified, "It had been a while, 'cause I hadn't been over there [to the 53rd Street house] in a long, long time." T. 349. Thus the Georgia

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* Ms. Brown did not examine the actual knife at trial.

Supreme Court correctly ruled in Nelson I that the evidence showed that Swinton "also had access to the murder weapon." 247 Ga. at 178, 274 S.E.2d at 323.

A serologist employed by the State Crime Lab in Atlanta testified that a semen sample taken from the victim's coat came from a man with type O blood. Forty-four percent of the population, including Petitioner, have type O blood. T. 362-64, 369. The serologist testified that she could have conducted a further test on the semen sample that could have eliminated Mr. Nelson as a suspect, but she failed to conduct that test. T. 375-76. The prosecution introduced no evidence concerning Alphonso Swinton's blood type.*

The prosecution also called Roger Parian, an employee of the State Crime Lab in Savannah, to testify as an opinion witness about a single hair found in "the vagina area" of the victim. T. 256. Parian testified that the hair was "similar" (T. 342) to a hair taken from Mr. Nelson's forearm and "could have come from" his forearm (T. 340, 342 (emphasis added)). Parian acknowledged that the hair also could have come from at least 120 other people in Chatham County at a "minimum." T. 343. Because simple hair analysis under a microscope is a very inexact process (T. 341-43), Parian conceded that this was an "[o]ff-the-wall" figure that "wouldn't be very accurate," and that the actual number could be even higher (T. 343). See also T. 338 ("It [microscopic hair analysis] is not a process in which you can identify a person as having produced a certain hair . . . .").

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* However, in colloquy before the trial judge outside the presence of the jury, the prosecutor stated that Alphonso Swinton also has type O blood. T. 268-69.

The prosecution introduced no evidence as to whether the hair could have come from Alphonso Swinton.

Both the prosecutor* and the trial court recognized that the State's evidence implicated Alphonso Swinton as much as it did Mr. Nelson, and that therefore the State had the burden of excluding Alphonso Swinton as a suspect in order to establish Mr. Nelson's guilt beyond a reasonable doubt. This is apparent from the following discussion between the trial court, the prosecutor Mr. Ryan, and Howard McGlasson, Mr. Nelson's court-appointed counsel, during a luncheon recess outside the presence of the jury:

> "(NOTE: The luncheon recess was taken at twelve-twenty p.m. and at one forty-five the following transpired outside the presence of the jury:)
>
> "MR. McGLASSON: There were [blood] samples taken of Alphonso Swinton as well as Gary Nelson, by virtue of search warrants which were issued by the Court. The samples of Gary Nelson turned out to be positive for International Blood Group B.
>
> "MR. RYAN: O, O.
>
> "MR. McGLASSON: Excuse me, O. The one for Swinton also turned out to be Blood Group O. Does the Court wish to exclude the Swington [sic] matter and leave only in the Nelson matter?
>
> "THE COURT: That's up to you. Do you want it in?
>
> "MR. McGLASSON: I think we'd better leave it in.
>
> "MR. RYAN: We're going to leave it in, for this reason, if it please the Court, that I have to bring Mike Hogan back, because Roger didn't send me . . . (unintelligible) . . .
>
> "Roger Parian also took a hair sample from Alphonso Swinton and the hair sample that he took from him could not have been the hair sample found on the body.

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* T. 332 ("Yes, sir; I intend to eliminate [Alphonso Swinton].") (remarks by the prosecutor).

"THE COURT: Well, I think - you know, as you know, your burden in a circumstantial evidence case is not only to prove guilt beyond a reasonable doubt, but to disprove every other reasonable theory of innocence, and that might be another reasonable theory that you need to disprove.

"MR. RYAN: Yes, sir. We are going to ask that it be left in. While the blood type was the same, the hair found on her vagina could not have been that of Alphonso Swington [sic].

"THE COURT: All right."

T. 268-69.

If the prosecutor had introduced such evidence concerning Swinton's hair at trial, that would have been the only probative evidence that did not implicate both Swinton and Mr. Nelson. However, as the Georgia Supreme Court conceded in Nelson II, the prosecutor failed to introduce any evidence he might have had which he characterized in this colloquy as showing that a hair found on the victim's body could not have come from Alphonso Swinton. 250 Ga. at 153; 296 S.E.2d at 591.

As a consequence, although each court below has determined that it was necessary for the State to exclude Swinton, there is no evidence in the record to exclude the reasonable hypothesis of Swinton's guilt. Thus, the evidence of record was insufficient as a matter of law to prove Mr. Nelson's guilt beyond a reasonable doubt.

D. How The Federal Questions Were Raised And Decided Below

As discussed supra, Mr. Nelson successfully moved for relief in the state habeas court on count one of his petition concerning the Swinton issue, but the Georgia Supreme Court reversed in Nelson II. In the habeas court and as appellee in Nelson II, Mr. Nelson also challenged the lack of meaningful

appellate review by the Georgia Supreme Court when it affirmed his convictions on direct appeal in Nelson I on the basis of evidence that was not in the record. After admitting that it had misread the trial record on direct appeal, but without explaining how such an error could be excused and without detailing what procedures it had adopted to prevent such errors from recurring, the Nelson II Court responded: "[W]e find meritless Nelson's contention that this Court violated the Eighth and Fourteenth Amendments by failing to provide the high standards of review demanded by those amendments in death penalty cases." Nelson II, 250 Ga. at 155; 296 S.E.2d at 593.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO A CAPITAL CONVICTION BASED ONLY ON THE EVIDENCE OF RECORD, TO A CAPITAL CONVICTION BASED ON SUFFICIENT EVIDENCE OF RECORD, AND TO MEANINGFUL APPELLATE REVIEW IN CAPITAL CASES WHERE (A) ON DIRECT APPEAL, THE GEORGIA SUPREME COURT AFFIRMED HIS CONVICTIONS AND DEATH SENTENCE ON THE BASIS OF "EVIDENCE" THAT IS CONCEDEDLY NOT IN THE TRIAL RECORD; (B) THE STATE HABEAS COURT THEN REVERSED HIS CONVICTIONS BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF RECORD; AND (C) ON A SUBSEQUENT APPEAL BY THE STATE, THE GEORGIA SUPREME COURT, CONCEDING THAT IT HAD MISREAD THE TRIAL RECORD ON DIRECT APPEAL, NEVERTHELESS REINSTATED PETITIONER'S CONVICTIONS AND DEATH SENTENCE IN A MANNER THAT IS BOTH UNSUPPORTED BY THE EVIDENCE AND INCONSISTENT WITH ITS EARLIER DECISION.

I.
PETITIONER WAS DENIED DUE PROCESS BY A CAPITAL CONVICTION BASED ON INSUFFICIENT EVIDENCE OF RECORD

In Jackson v. Virginia, 443 U.S. 307 (1979), this Court held:

> After Winship the critical inquiry on review

> of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt . . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

443 U.S. at 318-19 (emphasis added; footnote and original emphasis omitted). Jackson reaffirmed the holding of In re Winship, 397 U.S. 358 (1970):

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

397 U.S. at 364. Cf. Beck v. Alabama, 447 U.S. 625, 638 (1980) (increased need for reliability of the guilt determination in a capital case under the Eighth and Fourteenth Amendments); Model Penal Code § 210.6(1)(f) (death penalty excluded if, "although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt") (Proposed Official Draft 1962);

A. It Was Necessary For The State To Exclude Swinton As A Suspect In Order To Establish Petitioner's Guilt Beyond A Reasonable Doubt

The Georgia Supreme Court correctly held in both Nelson I and II that it was necessary for the State to exclude Alphonso Swinton as a suspect in order to establish Mr. Nelson's guilt beyond a reasonable doubt: "[F]or the state to meet its burden of proof it had to exclude the hypothesis that Swinton could have committed the murder." Nelson II, 250 Ga. at 154, 296 S.E.2d at 592. "In order for the state to prove its case against [Mr. Nelson], it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have

committed the murder." Nelson I, 247 Ga. at 323, 274 S.E.2d at 323.

The habeas court, the trial court and the prosecutor also recognized that it was necessary for the State to exclude Swinton in order to prove Mr. Nelson's guilt beyond a reasonable doubt. As the habeas court correctly held, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' In re Winship, 397 U.S. 358, 364 . . . . [W]ithout the evidence to exclude Swinton, the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia standard of proof beyond a reasonable doubt." June 3 Order at 2-3 (footnote omitted); accord, T. 269 (remarks by trial court); T. 332 ("Yes, sir; I intend to eliminate [Alphonso Swinton].") (remarks by the prosecutor).

Thus the identity of the perpetrator was an essential element that the State had to establish beyond a reasonable doubt -- indeed, this was the paramount issue at trial. Because the State's evidence pointed to Swinton at least as much as to Mr. Nelson, it was necessary for the State to exclude Swinton in order to prove beyond a reasonable doubt that Mr. Nelson, and not Swinton, committed the crimes. Accord, e.g., Vachon v. New Hampshire, 414 U.S. 478, 479 (1974) (conviction reversed where evidence was insufficient to prove essential element "that appellant personally [committed the crime] or even that he was aware of the [crime] or present . . . at the time"); Griffith v. State, 124 Ga. App. 505, 184 S.E.2d 477, 478 (1971) (the State failed to establish an "essential element of the crime, that is, that [the crime] was [committed] by the defendant," because it failed to

negate another reasonable hypothesis); Ga. Code Ann. § 24-4-6;* Ga. Code § 24-4-5.**

The holdings by the Georgia Supreme Court in Nelson I and II that it was necessary for the State to exclude Swinton in order to prove its case against Mr. Nelson are authoritative interpretations of State law by the State's highest Court and are binding on this Court. See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

B. The Evidence Of Record Was Insufficient To Exclude Swinton And To Convict Petitioner

In Nelson I, the Georgia Supreme Court erroneously ruled that the state had introduced "proof that the hair found on the victim could have come from [Petitioner's] arm, but could not have come from Swinton's arm." 247 Ga. at 177, 274 S.E.2d at 323. In Nelson II, the Court frankly conceded that this "proof" was "never introduced into evidence." Ga. 250 at 153; 296 S.E.2d at 591. Based solely on this erroneous reading of the record, the Court in Nelson I concluded that the State had satisfied its burden of excluding Swinton.

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* Ga. Code § 24-4-6 (formerly Ga. Code Ann. § 38-109) provides:

> To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

** Ga. Code § 24-4-5 (formerly Ga. Code Ann. § 38-110) provides:

> Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt.

The habeas court correctly recognized that "the evidence of the hair sample from Swinton was necessary to exclude the hypothesis that Swinton could have committed the crime," and that "without the evidence to exclude Swinton the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia standard of proof beyond a reasonable doubt." June 3 Order at 4 (footnote omitted). The Georgia Supreme Court in Nelson II nonetheless refused to accept the necessary consequences of its decision in Nelson I. Instead of affirming the June 3 Order reversing the convictions for insufficient evidence of record, the Court in Nelson II changed course. It re-read the record and isolated the following four items of equivocal, inconclusive or non-existent evidence in order to support its reversal of the June 3 Order and its reinstatement of Petitioner's convictions and death sentence:

(1) "the knife used to kill the victim came from the defendant's home";

(2) "the last time Valerie Armstrong was seen alive she was at Nelson's residence at a time that he was also present;"

(3) "Swinton had moved out of the residence some five to six weeks prior to the murder and did not subsequently frequent Nelson's residence (Nelson stated that it had been two to three weeks since Swinton had come by);" and

(4) "the hair found on the victim was consistent with and could have come from Nelson (the state's microanalyst testified that in addition to Nelson at least 120

or more people in the Savannah area could have hair similar to that found on the victim)."

250 Ga. at 154-55; 296 S.E.2d at 592. As demonstrated below, none of this evidence, taken alone or as a whole, is sufficient to exclude Swinton and convict Petitioner.

1. Swinton "Also Had Access To The Murder Weapon"

The fact that "the knife used to kill the victim came from the defendant's home" (Nelson II, 250 Ga. at 155, 296 S.E.2d at 592) is not probative to exclude Swinton, since the evidence at trial demonstrated that Swinton "also had access to the murder weapon" (Nelson I, 247 Ga. at 178, 274 S.E.2d at 323).

Viewing all the evidence relating to the knife in the light most favorable to the prosecution (see Jackson v. Virginia, 443 U.S. at 319), the prosecution established only that the knife found some 15 to 17 feet from the victim* had been seen by Patricia Brown, Swinton's girl friend for over 12 years (T. 345-46), in the house on 53rd Street a "long, long time" before the victim disappeared, while Swinton and Mr. Nelson were both living there. T. 349. Looking at only a photograph of the knife more than two years after the crime, Brown testified that she had used the knife to cut chicken once for Swinton when Swinton and Mr. Nelson were sharing the same house. T. 346-49. Although she visited the house about one week before the crimes to see Swinton, she did not find Swinton there and she did not see the

* Aside from the location where it was found, there was no evidence that this knife was the murder weapon. There was no forensic evidence of any kind that this knife caused, or even that it was physically consistent with, the victim's wounds.

knife in the house at that time. T. 347-50. Certainly if this evidence -- which the prosecutor thought was central to the State's case against Mr. Nelson (T. 649-51) -- links the knife to Petitioner, it is equally incriminating against Swinton. No evidence was presented that the knife remained in the house or in Mr. Nelson's possession after Swinton moved out. Given the evidence of record, it is equally likely that Swinton took the knife when he moved out of the house (or that he had access to it after moving out), as it is that Mr. Nelson had the knife at the time of the crimes.

Thus, the Georgia Supreme Court correctly established the law of the case* in Nelson I when it held that the evidence demonstrated that Swinton "also had access to the murder weapon." 247 Ga. at 178, 274 S.E.2d at 323. The gratuitous observation in Nelson II that "the knife used to kill the victim came from the defendant's home" (250 Ga. at 155; 296 S.E.2d at 592) therefore proves nothing.

2. Even If Mr. Nelson Was Present When Sabrina Williams Last Saw The Victim, That Would Not Be Sufficient To Exclude Swinton And Convict Petitioner

The Georgia Supreme Court asserted that "the last time Valerie Armstrong was seen alive she was at Nelson's residence at a time that he was also present." Nelson II, 250 Ga. at 154, 296 S.E.2d at 592. Assuming arguendo that this was so -- a point we do not concede in light of the contradictory nature of Sabrina Williams's identification testimony (see supra pp. 6-8)

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* See Ashe v. Swenson, 397 U.S. 436, 443-46 (1970); United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916); Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968); Ga. Code § 9-11-60(h). See generally infra p. 27.

-- it hardly excludes Swinton. There is no evidence as to what transpired between the time that Sabrina Williams claimed to have seen the victim walking towards Uncle Al's house on February 19 and the discovery of the body the following afternoon. There is no evidence that the victim was killed at the 53rd Street house; indeed, her body and the alleged murder weapon were found in a field some distance away. T. 232-33, 240, 261. There is no evidence as to whether the victim was killed on February 19 or 20, or how long the victim had been dead when the police found her body at 3:00 p.m. on February 20. The prosecution failed to prove the time or place of her death, or Mr. Nelson's whereabouts at that time. Indeed, the evidence suggests that Mr. Nelson was no longer at the house at dusk on February 19, when the victim was still in her own backyard. T. 221, 225-27; see also supra pp. 8-9.

The testimony of the victim's playmate, Sabrina Williams, did not exclude Alphonso Swinton as a suspect in the crimes. Indeed, it may incriminate Uncle Al, the candy man, more than Mr. Nelson. Sabrina testified at trial that she and the victim walked to a store on the corner of their street to buy some candy the day the victim disappeared. T. 303. Because the victim had no money, on their way back from the store she left Sabrina, saying that she intended to go to Uncle Al's house to get money for candy. T. 303-04, 319. The fact that the children referred to the house as Uncle Al's house and that the victim would go to Uncle Al to get money for candy corroborates the testimony of Swinton's girl friend, Patricia Brown, that Swinton encouraged the neighborhood children to come around by leaving candy around the house. T. 353-54.

Finally, the identification testimony underlying the assertion that the victim was last seen alive at a time when Petitioner was also present is so contradictory and inconclusive as to be entitled to little, if any, weight. Although Sabrina Williams testified at a pretrial hearing that she did not see anyone else in the backyard of Uncle Al's house with the victim (T. 320-21), at trial she testified that she saw a man in the backyard dressed in black (T. 305, 326) from a vantage point across the street nearly an hour after sunset when it was completely dark. See supra p. 8. Sabrina testified at trial that Mr. Nelson was not the man in the backyard of Al's house (T. 312, 315, 321, 324), although at the earlier pretrial police photographic lineup she had selected a photograph of Petitioner that "might have been" (T. 314) the man in the backyard, but she "wasn't sure" (T. 318).

3. The Fact That Swinton Had Moved Out Of The House Was Not Sufficient To Exclude Him

The Georgia Supreme Court in Nelson II pointed out that "Swinton had moved out of the residence some five to six weeks prior to the murder." 250 Ga. at 154; 296 S.E.2d at 592. Although the fact that Swinton had moved out may have been relevant to determine in the first instance whether or not it was necessary to exclude Swinton as a suspect, the Georgia Supreme Court correctly resolved that issue when it held in both Nelson I and II that on this record it was necessary for the State to exclude Swinton. Nelson II, 250 Ga. at 154; 296 S.E.2d at 592; Nelson I, 247 Ga. at 178, 274 S.E. 2d at 323.

The fact that Swinton had moved out is not sufficient to exclude Swinton and convict Mr. Nelson. First, there is no

evidence that the victim was killed or assaulted at the house. Indeed, the fact that the victim's body and the alleged murder weapon were found in a field some distance away suggests otherwise. See supra pp. 19-20.

Second, the only evidence tending to connect the knife (and hence Mr. Nelson) to the crimes is the testimony of Swinton's girl friend, Patricia Brown, who saw the knife "a long, long time ago" at the 53rd Street house when both Swinton and Mr. Nelson were living there. Thus the State's evidence showed that Swinton "also had access to the murder weapon." Nelson I, 247 Ga. at 178, 274 S.E.2d at 323.

Third, the State's case established that even though Swinton moved out in late January 1978, Swinton continued to frequent the house with such regularity that many people thought that Swinton still lived there. For example, Ray McCray, the victim's stepfather, testified that Swinton was living in the house on February 19th, the day Valerie disappeared. T. 182. Swinton's girl friend, Patricia Brown, testified that she went to the house a week before Valerie's disappearance to see Swinton. T. 347-48. Mr. Nelson also told the police during his interview at the police station on February 25, 1978 (T. 412) that Swinton had been at the house about two weeks earlier (i.e., one week before the crime). T. 426-27. Thus the Georgia Supreme Court's remark in Nelson II that "Swinton . . . did not subsequently frequent Nelson's residence," like its assertion in Nelson I that the evidence included proof that the hair taken from the victim's body did not come from Swinton, is not supported by the record.

In fact, the police believed that Swinton was a suspect even though he had moved out. The police obtained search warrants

for, and blood and hair samples from, Swinton (T. 269), and included a picture of Swinton in the array of five or six photographs shown to Sabrina Williams (T. 272-273, 282).* The prosecutor, the trial court, the Georgia Supreme Court and the habeas court all considered Swinton a reasonable suspect whose guilt the prosecution had the burden of eliminating. T. 268-69, 332; June 3 Order at 4. It wa not until the decision in Nelson II that anyone suggested that the fact that Swinton had moved out relieved the State of that burden.

4. The Evidence Relating To Nelson's Hair Did Not Exclude Swinton

The Georgia Supreme Court's contention that "the hair found on the victim was consistent with and could have come from Nelson" (Nelson II, 250 Ga. at 154-55, 296 S.E.2d at 592) lacks any probative value to exclude Swinton. Moreover, "the state's microanalyst testified that in addition to Nelson at least 120 or more people in the Savannah area could have hair similar to that found on the victim." Id. As Roger Parian testified at trial, hair comparison "is not a process in which you can identify a person as having produced a certain hair." T. 338.** Similarly,

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* There was also another black man with a prior criminal record in the immediate area when Valerie Armstrong disappeared. His photograph, taken from police files (T. 283), was identified by Sabrina Williams as that of a man she saw on the corner next to the candy store as she and the victim were leaving. T. 276, 283, 329-30. This was only minutes before Sabrina and the victim parted company a short distance away.

** Although the trial court permitted Parian to testify as an opinion witness over defense objection (T. 336), Parian was hardly an expert on hair comparisons. His educational background was not in the fields of biology, medicine or the natural sciences, but in physics. T. 335. His title of "microanalyst" was self-assumed -- because he sometimes used a microscope in his work. T. 334. Parian's only training had been "on the job" at the crime lab branch in Savannah, but he admitted that "[w]e at the laboratory do not specialize in one particular area such as hair identification." T. 335-36 (emphasis added).

the semen sample scraped from the victim's coat came from a man with type O blood. Type O is the most common blood type, present in 44% of the population, including both Petitioner and Swinton.*

Thus, Uncle Al, the candy man, was at least as strong a suspect as Mr. Nelson, having lived in the same house at the only time that the knife was placed there by the prosecution's evidence, having befriended the neighborhood children through offers of candy, having been known as "Uncle Al" by those children, and having had the same blood type as that obtained from the sperm found on the victim's coat. T. 268-69, 304, 319, 353-55.

In sum, the record may be searched in vain for sufficient evidence -- documentary, scientific, testimonial or otherwise -- to disprove the reasonable hypothesis that Alphonso Swinton, and not Mr. Nelson, committed the crimes. The prosecution failed to meet its burden of excluding Alphonso Swinton and of establishing Mr. Nelson's guilt beyond a reasonable doubt.

II.

PETITIONER'S CONVICTIONS AND DEATH SENTENCE BASED ON INSUFFICIENT EVIDENCE OF RECORD, THE AFFIRMANCE ON DIRECT APPEAL IN NELSON I BASED ON MATTERS OUTSIDE THE RECORD, AND THE INCONSISTENT RULING ON HABEAS APPEAL IN NELSON II VIOLATED "THE MOST FUNDAMENTAL CONCEPTS OF DUE PROCESS"

In Furman v. Georgia, 408 U.S. 238 (1972), this Court held that the death penalty constitutes cruel and unusual

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* See T. 369. In colloquy, the prosecutor stated that Swinton also has type O blood. T. 268-69. Further, although it would have been possible to analyze the semen sample further to establish a more precise identification that could have excluded Mr. Nelson, no such test was performed in the State's crime lab. Rather, the police held the sample for months before bothering to analyze it; by then, only the fact that it was type O could be determined. T. 370-76. In addition, the only semen that was typed was a dried sample removed from the victim's coat. Although the State's pathologist testified that semen was present in the victim's vagina, none was removed, typed, or tested in any way. T. 376-77.

punishment in violation of the Eighth and Fourteenth Amendments in the absence of adequate procedural safeguards against the arbitrary and capricious imposition of a death sentence. See Gregg v. Georgia, 428 U.S. 153, 169 n.15, 188-89, 220-21 (1976). In an attempt to cure the constitutional deficiencies condemned in Furman, Georgia enacted a new death penalty statute premised on meaningful and principled appellate review by the Georgia Supreme Court of the evidence of record in every capital case. See Ga. Code Ann. § 27-2537(c)(2).

This Court expressly relied on the assumption that the Georgia Supreme Court would engage in "meaningful" and "responsible" appellate review of the trial record in every case "with a maximum of rationality and consistency" (Proffitt v. Florida, 428 U.S. 242, 258-59 (1976)), when this Court upheld the post-Furman Georgia death penalty statute on its face. Gregg v. Georgia, 428 U.S. 153, 195, 198, 201-02, 204-07 (1976) (plurality opinion); id. at 211-12, 222-24 (White, J., concurring); accord, Godfrey v. Georgia, 446 U.S. 420, 427-29 (1980) (plurality opinion); Enmund v. Florida, __ U.S. __, 102 S.Ct. 3368, 3394 n.46 (1982) (death sentence must be reversed where state supreme court failed to engage in meaningful appellate review of the trial record) (O'Connor, J., dissenting); Dobbert v. Florida, 432 U.S. 282, 295 (1977) (meaningful appellate review is a "crucial protection" that "is by no means perfunctory") (Rehnquist, J.).

This Court's expectation of meaningful appellate review was not realized in the present case. On direct appeal, the Georgia Supreme Court affirmed Mr. Nelson's convictions on the basis of information concerning Swinton that was never subjected to confrontation, cross-examination or rebuttal by the defendant,

and never admitted into evidence before the jury. Mr. Nelson was denied due process of law when his convictions and death sentence were affirmed on appeal at least in part on the basis of information that he had no opportunity to deny or explain. Gardner v. Florida, 430 U.S. 349, 362 (1977).*

The Georgia Supreme Court's reliance on the Swinton "hair evidence" in Nelson I was a "'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Davis v. Alaska, 415 U.S. 308, 318 (1974). Having conceded that the only evidence on which it relied to exclude Swinton in Nelson I was not in the record, the Georgia Supreme Court did not "cure" that constitutional error when it reinstated Petitioner's convictions in Nelson II.

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* It is inherent in the concept of due process that facts used against a criminal defendant must be formally introduced into evidence in open court so that the accused will have the opportunity to confront the witnesses against him, to cross-examine those witnesses, and to have his guilt determined by the jury at trial and evaluated by the appellate court based on evidence in the official record. As this Court held in Turner v. Louisiana, 379 U.S. 466 (1965):

> The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. . . .
>
> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

379 U.S. 472-73 (emphasis added; footnote omitted); accord, Davis v. Alaska, 415 U.S. 308, 315-18 (1974); Douglas v. Alabama, 380 U.S. 415, 418-420 (1965); Pointer v. Texas, 380 U.S. 400, 403-406 (1965) (Sixth Amendment right to confront and cross-examine witnesses made applicable to the states through the Due Process clause of the Fourteenth Amendment).

The Georgia Supreme Court in Nelson II combed the record for bits and pieces of evidence to replace the Swinton "proof" that it had properly viewed in Nelson I as critical to the State's acknowledged burden to exclude Swinton. We have shown that that effort was unavailing. See supra pp. 16-24. But the Georgia Supreme Court's attempt in Nelson II to evade the necessary consequences of its decision in Nelson I also violated Petitioner's rights under the double jeopardy clause of the Fifth Amendment, which includes a collateral estoppel component made applicable to the states under the Fourteenth Amendment. See Ashe v. Swenson, 397 U.S. 436, 443-46 (1970); United States v. Oppenheimer, 242 U.S. 85, 87-88 (1916); accord, Strauss v. Stynchcombe, 224 Ga. 859, 165 S.E.2d 302 (1968) (ruling on direct appeal is binding as the law of the case in a subsequent habeas proceeding); Ga. Code § 9-11-60(h) (formerly Ga. Code Ann. § 81A-160(h)) ("any ruling by the Supreme Court . . . in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court").

Beyond that, the Georgia Supreme Court's approach in Nelson II raises serious questions about whether the premises underlying this Court's decision in Gregg v. Georgia and its progeny remain valid. The Georgia Supreme Court's review of the record on direct appeal was unquestionably "ineffective," "arbitrary," and "cursory or rubber stamp review." Proffitt v. Florida, 428 U.S. at 258-59. And compared with the June 3 Order reversing Mr. Nelson's convictions under the authority of Nelson I, the Georgia Supreme Court's decision in Nelson II reflects "a [minimum] of rationality and consistency" and "subjective and unpredictable" review of Petitioner's convictions and death sentence by the Georgia Supreme Court. Proffitt v. Florida, 428 U.S. at

258-59. These are precisely the vices condemned as unconstitutional in Furman v. Georgia. The Georgia Supreme Court "failed properly to perform its task in this case," and this case demonstrates that the Georgia Supreme Court "is incapable of performing its task adequately in all cases." Gregg v. Georgia, 428 U.S. at 224 (White, J., concurring). To paraphrase Gregg, "It is apparent that the Supreme Court of Georgia has [not] taken its review responsibilities seriously." Gregg v. Georgia, 428 U.S. at 205 (plurality opinion). The Georgia Supreme Court affirmed and subsequently reinstated the convictions and death sentence in this case in a manner "inconsistent with the basis upon which the [Georgia] capital-sentencing procedure was upheld." Gardner v. Florida, 430 U.S. 349, 360 n.11 (1977).

The simple fact is that in Nelson I, the Georgia Supreme Court correctly viewed the Swinton "evidence" as crucial to the State's case. In Nelson II, confronted with the acknowledged failure of the State to introduce that proof, the Georgia Supreme Court struggled to cure the defect in the State's case. The prosecution was not entitled to such aid and assistance from the Court. Because "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" (Gardner v. Florida, 430 U.S. at 358), and because of the increased need for reliability in the fact finding process in a capital case (see, e.g., Beck v. Alabama, 447 U.S. 625, 638 (1980); Gardner v. Florida, 430 U.S. at 357-62; Lockett v. Ohio, 428 U.S. 586, 604, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 117 n.* (1982) (O'Connor, J., concurring)), Petitioner's convictions and death sentence should be reversed. As

the habeas court held, the Georgia Supreme Court's decision in Nelson I violated "the most fundamental concepts of Due Process." June 3 Order at 4. The Georgia Supreme Court's decision in Nelson II compounded that error by taking a fundamentally inconsistent view of the same trial record it had purportedly reviewed in careful detail in Nelson I.

CONCLUSION

For the reasons stated and under the authorities cited above, Petitioner prays that this Court grant the petition for a writ of certiorari to review the decision of the Georgia Supreme Court reinstating Petitioner's convictions and death sentence.

Dated: January 26, 1983

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No. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

GARY X. NELSON,

Petitioner,

-against-

WALTER D. ZANT, Warden,
Georgia Diagnostic & Classification
Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this petition for a writ of certiorari upon respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

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Joline R. Williams, Clerk
Supreme Court of Georgia
Room 506
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Atlanta, Georgia 30334

Done this 26th day of January, 1983.

Richard H. Sayler

Richard H. Sayler, Esq.

36555. NELSON v. THE STATE.

MARSHALL, Justice.

The appellant, Gary X. Nelson, was convicted of murder, aggravated sodomy, and rape. The jury found that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Code Ann. § 27-2534.1 (b)(7). The appellant was given the death penalty for the murder conviction, and he was given consecutive life sentences for the rape and aggravated sodomy convictions.

The state presented evidence at trial to the following effect:

The victim was a six-year-old girl, and the appellant and the victim's family were neighbors, living one-half block from each other.

The victim was reported missing on the evening of Sunday, February 19, 1978. On that morning, the appellant had gone to the victim's home to borrow a wrench from her stepfather, Ray McCray. There is testimony that the appellant drank some vodka at the McCray residence, and then Mr. McCray accompanied the appellant back to the appellant's house to help the appellant do some work on his Volkswagen. Around dusk, they returned to the McCrays. Mr. McCray testified that his children were playing in the yard and he pointed the victim out to the appellant, stating, "That's my little girl right here." McCray testified that the appellant replied, "Yeah, I know, that's my little buddy because she comes down to the house all

the time to go to the store for us." According to Mr. McCray's testimony, the appellant then went back into the McCray residence, had another drink of vodka, and then returned to his own home.

Sabrina Williams, who is eight years old, testified that she was playing with the victim around dusk on the Sunday the victim disappeared. She and the victim went to the store, but the victim did not have any money. Sabrina testified that on their way back from the store, the victim left her in order to go to the appellant's house to get some money. The victim referred to the house as "Uncle Al's house." The appellant's roommate was Alphonso Swinton. The last time Sabrina saw the victim, the victim was walking toward this house and there was a man working on a Volkswagen in the yard. A few days later, Sabrina identified the appellant from a photographic array as the man working on the Volkswagen. However, she testified at trial that the appellant was not the man.

The victim's body was discovered in a wooded area near her house on Monday, February 20th. The victim had been brutally raped, sodomised, and stabbed. A distinctive-looking knife with tape wrapped around its handle was found within several feet of the body. Seminal fluid found on the victim's coat contained a blood type which is the same blood type as the appellant's, which is blood type O. (There is evidence that 44% of the population have this blood type.) Forensic evidence established that a hair found on the victim could have come from the appellant's arm, but could not have come from the arm of the appellant's roommate, Alphonso Swinton. (There is evidence that approximately 123 people in the area would have similar hair samples.)

There is testimony that during the police investigation of the case, the appellant's girl friend, Diane Knight, identified the knife found at the scene of the murder as being the appellant's knife. An investigating police officer also testified that Diane Knight informed the police that the appellant had instructed her not to identify the knife. At trial, she repudiated her earlier statement to the police that the knife was the appellant's, and she testified that this was not the appellant's knife. However, there was testimony from another witness that this was the knife in the appellant's house. At trial, Ms. Knight also repudiated a pretrial statement which she had given to the police in which she maintained that she had been with the appellant during the day and evening of February 19. Ms. Knight testified at trial that she had not been with the appellant during this time.

The victim's stepfather testified that on Tuesday, February 21, he received an anonymous telephone call from a person whom he identified as the appellant. McCray testified that the appellant told

him that "a fellow on the east side by the name of Blue" killed his daughter. It was later determined by the police that the person identified as "Blue" could not have committed the crime.

The appellant testified at trial. He denied that he knew the victim by name or that she came to his house often. And, he denied telling this to Mr. McCray. He also denied being at the McCray residence on Sunday, February 19. However, he did admit that it was he who was working on his Volkswagen on that day. *Held:*

1. The evidence, when viewed as a whole, is sufficient to authorize a rational trier of fact to find the appellant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. The trial judge did not abuse his discretion in setting bail at $10,000. See Code Ann. § 27-901; *Smith v. State*, 245 Ga. 168 (2) (263 SE2d 910) (1980); *Harris v. Hopper*, 236 Ga. 389 (224 SE2d 1) (1976).

3. The trial judge did not err in overruling the appellant's motion for acquittal on the ground that two grand juries had returned no-bills of indictment. Nor did the trial judge err in overruling his motion to dismiss for denial of the appellant's constitutional right to a speedy trial.

The appellant was arrested on May 26, 1978. On December 10, 1978, he filed a demand for indictment, and on April 4, 1979, he was ordered released from incarceration pursuant to his writ of habeas corpus for failure of the grand jury to indict him. It appears that the grand jury deferred voting on the bill of indictment against the appellant in order to permit the district attorney further time for investigation, in that a key witness, Diane Knight, could not be located. On October 3, 1979, the grand jury returned a bill of indictment against the appellant for murder. This case came on for trial on February 27, 1980.

It is true that two returns of no bills by a grand jury generally bars further prosecution for the same offense. Code Ann. § 27-702. However, a mere failure of the grand jury to indict does not constitute the return of a no bill. *Chafin v. Jones*, 243 Ga. 267 (253 SE2d 389) (1979). Accordingly, the trial judge did not err in overruling the appellant's motion for acquittal.

Nor do we find the appellant's Sixth Amendment right to a speedy trial to have been violated. *Barker v. Wingo*, 407 U. S. 514 (92 SC 2182, 33 LE2d 101) (1972), sets out the factors for determining whether there has been a denial of the Sixth Amendment right to speedy trial:

(1) *Length of delay* — The length of delay between appellant's arrest and his trial was 22 months. However, during some of this time he was in jail under a conviction of involuntary manslaughter. He was

released on habeas corpus approximately 10 months prior to trial.

(2) *Reason for delay* — The reason for the delay in the return of the indictment was that a key witness could not be located. This is a legitimate reason for delay and does not constitute deliberate prosecutorial delay for tactical advantage. Cf., United States v. Marion, 404 U. S. 307 (92 SC 455, 30 LE2d 468) (1971); *Haisman v. State*, 242 Ga. 896 (2) (252 SE2d 397) (1979).

(3) *Assertion of right* — The appellant asserted his right to speedy trial by filing a demand for indictment several months after his arrest.

(4) *Prejudice* — The appellant was released approximately 10 months prior to trial, and during the approximately 10 months he was in jail, he was serving time on another charge. He has not shown any way in which his defense was impaired by the delay.

Considering all of these factors, we hold that the trial judge did not abuse his discretion in ruling that the appellant has not been denied his Sixth Amendment right to a speedy trial. See *Jackson v. State*, 244 Ga. 276 (2) (260 SE2d 15) (1979).

4. After an in-camera inspection of the prosecutor's files, the trial judge supplied the defense with all evidence found to be material under Brady v. Maryland, 373 U. S. 83 (83 SC 1194, 10 LE2d 215) (1963). In addition, the prosecutor provided the defense with all writings and tangible objects required to be produced under the appellant's Code Ann. § 38-801 (g) notice to produce. *Hamby v. State*, 243 Ga. 339 (2) (253 SE2d 759) (1979); *Brown v. State*, 238 Ga. 98 (231 SE2d 65) (1976). The appellant has not made a showing of any evidence withheld under Brady or any material which was required to be, but not, produced under the notice to produce. We find no error here.

5. Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, *Bowden v. Zant*, 244 Ga. 260 (15C) (260 SE2d 465) (1979), the appellant did receive notice of the state's intent to proceed under § 27-2534.1 (b) (7) here.

6. The trial judge did not abuse his discretion in overruling the motion for change of venue.

There is no evidence in the record that there was such widespread, adverse, pretrial publicity that the prospective jurors could not lay aside their opinions and render a verdict based solely on the evidence. Only 38 prospective jurors were examined before a jury was struck, and only seven of these prospective jurors were excused for being prejudiced or having a fixed opinion as to guilt or innocence. This low dismissal rate corroborates the absence of such prejudicial pretrial publicity as would require the grant of the appellant's motion

for change of venue. Murphy v. Florida, 421 U. S. 794 (95 SC 2031, 44 LE2d 589) (1975); *Tucker v. State*, 244 Ga. 721 (12) (261 SE2d 635) (1979); *Collier v. State*, 244 Ga. 553, 572 (261 SE2d 364) (1979). In addition, the prospective jurors were carefully questioned in order to ensure that the jurors selected to try the case were not prejudiced by pretrial rumors. See *Chenault v. State*, 234 Ga. 216 (5) (215 SE2d 223) (1975).

7. Two prospective jurors were properly excused for cause under Witherspoon v. Illinois, 391 U. S. 510 (88 SC 1770, 20 LE2d 776) (1968) and Lockett v. Ohio, 438 U. S. 586 (98 SC 2954, 57 LE2d 973) (1978). This did not deprive the appellant of his right to a jury selected from a representative cross-section of the community. *Bowen v. State*, 244 Ga. 495 (3) (260 SE2d 909) (1979).

8. The trial judge did not commit error in refusing to strike for cause a prospective juror who stated on voir dire that he believed the burden of proof on the state to be too high, in that this prospective juror further stated that he could lay aside his personal opinions as to the burden of proof that the state had to bear and follow whatever instructions the trial court might give him as to the burden of proof.

9. The photographic array shown to Sabrina Williams by the police was not impermissibly suggestive. Therefore, the trial judge did not err in overruling the appellant's motion to suppress Sabrina's pretrial identification of the appellant from the photographic array. *McCleskey v. State*, 245 Ga. 108 (2) (263 SE2d 146) (1980); *Gravitt v. State*, 239 Ga. 709 (4) (239 SE2d 149) (1977).

Nor can we say that the trial judge committed error in allowing a photograph of the appellant to be introduced as an exhibit at trial, in that the trial judge found that this was the photograph which Sabrina Williams had picked out of the photographic array.

10. The trial judge did not abuse his discretion in admitting transcripts of pretrial statements given by the appellant to the police. United States v. Wilson, 578 F2d 67 (5th Cir. 1978).

Defense counsel sought to have tape recordings of these statements admitted in lieu of the transcripts, because the defense asserted that the voice inflections of the appellant and those conducting the interrogation would reveal the confusing nature of the interrogation. The tapes were played to the jury, but portions of the tapes were unintelligible. The trial judge then allowed the transcripts to be read into evidence. No objection was made by defense counsel at trial. We find no abuse of discretion on the part of the trial court in admitting the transcripts.

11. The trial judge's failure to give the appellant's request to charge under *Williams v. State*, 11 Ga. App. 682 (75 SE 988) (1912), was not error.

Williams holds that without corroboration one cannot be convicted of a crime upon hearsay testimony as to statements of a child who is incompetent as a witness because too young to appreciate the nature and sanctity of the oath. In this case, there is corroboration of Sabrina Williams' testimony and her pretrial statements. In addition, she was not found to be incompetent as a witness. Therefore, the pronouncements of law in *Williams* are not correct statements of law as applied to the facts of this case. Accordingly, the trial judge did not err in refusing to give the request to charge. *Dampier v. State*, 245 Ga. 427 (265 SE2d 565) (1980).

12. Since the appellant's other requests to charge were given in substance by the trial judge, the failure to charge in exactly the language requested was not error. E.g., *Mason v. State*, 236 Ga. 46 (5) (222 SE2d 339) (1976).

13. The trial judge did not abuse his discretion in admitting in evidence at the presentence hearing, photographs depicting the injuries to the victim. E.g., *Tucker v. State*, 245 Ga. 68 (263 SE2d 109) (1980); *Mooney v. State*, 243 Ga. 373 (254 SE2d 337) (1979).

14. The trial judge correctly charged the jury on mitigating circumstances at the presentence hearing. See *Hance v. State*, 245 Ga. 856 (268 SE2d 339) (1980); *Collins v. State*, 243 Ga. 291 (253 SE2d 729) (1979).

15. Imposition of the death penalty on circumstantial evidence alone is not unconstitutional. *Douthit v. State*, 239 Ga. 61 (6) (235 SE2d 493) (1977), cert. denied, Douthit v. Georgia, 445 U. S. 938 (1980).

The jury was charged on circumstantial evidence and the reasonable hypothesis rule pursuant to Code § 38-109. We agree that the evidence excludes every reasonable hypothesis save that of guilt.

16. The appellant's consecutive life sentences for rape and aggravated sodomy do not violate the Eighth Amendment's ban on cruel and unusual punishment. *Crawford v. State*, 236 Ga. 491 (224 SE2d 365) (1976).

17. Georgia's death penalty statute has been held on numerous occasions to be constitutional. Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976). *Willis v. State*, 243 Ga. 185 (10) (253 SE2d 70) (1979).

18. The method of execution in this state does not constitute cruel and unusual punishment. *Collier v. State*, 244 Ga. 553, supra, (18).

19. The trial judge did not err in admitting the evidence concerning Alphonso Swinton. The evidence introduced included proof that the hair found on the victim could have come from the appellant's arm, but could not have come from Swinton's arm.

Swinton was the appellant's roommate. In order for the state to prove its case against the appellant, it was necessary for the state to exclude the possibility that Swinton, who also had access to the murder weapon, could have committed the murder. The evidence concerning Swinton was, therefore, relevant to the issue of the appellant's guilt or innocence of the murder charge.

Sentence Review.

From a review of the record and transcript, we conclude that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

In this case, the evidence shows that the appellant brutally murdered a six-year-old girl through the infliction of multiple stab wounds. Prior to being killed, the victim was raped and sodomized. Her vagina, rectum, as well as other parts of her body, were severely bruised and bleeding; her lips were torn from her teeth (lacerations or tears of her lips); and it took approximately 30 minutes after the infliction of a deep stab wound to her chest for her to bleed to death. From the evidence, the jury was fully authorized in finding that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." See generally *Hance v. State*, 245 Ga. 856, supra. The verdict is factually substantiated.

In reviewing the death penalty in this case, we have considered cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed. We find that the following similar cases listed in the appendix support the affirmance of the death penalty in this case. The appellant's sentence to death for murder is not excessive or disproportionate, considering both the crime and the defendant.

Judgment affirmed. All the Justices concur, except as to Divisions 5 and 15, Hill, P. J., concurs specially. Gregory, J., not participating.

DECIDED JANUARY 27, 1981 — REHEARING DENIED FEBRUARY 24, 1981.

Murder, etc. Chatham Superior Court. Before Judge Cheatham.

Howard A. McGlasson, Jr., for appellant.

Andrew J. Ryan III, District Attorney, Arthur K. Bolton, Attorney General, John W. Dunsmore, Jr., Assistant Attorney General, for appellee.

APPENDIX.

House v. State, 232 Ga. 140 (205 SE2d 217) (1974); *Presnell v. State*, 241 Ga. 49 (243 SE2d 496) (1978); *Griggs v. State*, 241 Ga. 317

(245 SE2d 269) (1978); *Ruffin v. State*, 243 Ga. 95 (252 SE2d 472) (1979); *Bowen v. State*, 244 Ga. 496 (260 SE2d 909) (1979); *Patrick v. State*, 245 Ga. 417 (265 SE2d 553) (1980); *Thomas v. State*, 245 Ga. 688 (266 SE2d 499) (1980); *Hill v. State*, 246 Ga. 402 (271 SE2d 802) (1980); *Cape v. State*, 246 Ga. 520 (272 SE2d 487) (1980).

HILL, Presiding Justice, concurring specially.

I concur specially as to Divisions 5 and 15.

(5) Although the state is not required to serve a defendant with notice of the statutory aggravating circumstance it intends to prove, *Bowden v. Zant*, Division 15C, supra, the state is required to make known to the defendant prior to the beginning of the trial the additional *evidence* it will introduce in aggravation of punishment during the sentencing phase of trial. Code § 27-2503. I therefore concur in Division 5 of the majority opinion in this case. See *Bowden v. Zant*, supra, Hill, J., concurring specially, 244 Ga. at 265.

(15) In this case the evidence is circumstantial as to the defendant's guilt, not as to the aggravating circumstance. Compare *Douthit v. State*, 239 Ga. 81 (6) (235 SE2d 493) (1977). The evidence as to the aggravating circumstance was direct (multiple stab wounds, etc.). Thus, in this case the circumstantial evidence issue directly affects only the defendant's conviction.

Convictions based upon circumstantial evidence are not unconstitutional, so long as "... the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of ... guilt...," Code § 38-109, and so long as, after viewing the evidence in the light most favorable to support the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979). See Divisions 1 and 15 of the majority opinion.

Like this court, other courts have affirmed death penalties where the evidence of guilt was circumstantial. State v. Peery, 199 Neb. 656 (261 NW2d 95, 100) (1977), cert. den. 439 U. S. 882 (99 SC 220, 58 LE2d 194) (1978); Thomas v. State, 374 S2d 508, 513 (Fla. 1979), cert. den. 445 U. S. 972 (1980); State v. Carriger, 123 Ariz. 335 (599 P2d 788) (1979), cert. den. 444 U. S. 1049 (1980).

I therefore concur in Division 15 of the majority opinion.

Exhibit B

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

GARY X. NELSON,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	CASE NO. 5387
WALTER D. ZANT, WARDEN GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This habeas corpus petition challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Chatham County. Petitioner was convicted of murder, aggravated sodomy, and rape. He received a death sentence for murder and consecutive life sentences for aggravated sodomy and rape. His convictions and sentences were affirmed on direct appeal. Nelson v. State, 247 Ga. 172 (1981). Certiorari was denied by the Supreme Court of the United States.

The petition contains 22 numbered counts which allege substantive claims for relief (1-22). By agreement of counsel, the issue raised in count 1 was severed and presented by brief and oral argument, with the right to an evidentiary hearing on the remaining counts reserved. The Court, accordingly, will address only the issue raised in count 1.

The record in this case consists of the record and transcript of Petitioner's trial in the Chatham

FILED June 3 1982 at 12:10 P.M.
Carol L. Tolson CHIEF DEP. CLERK
BUTTS SUPERIOR COURT

Superior Court.

COUNT 1

In count 1, Petitioner contends that his right to due process under the Fifth and Fourteenth Amendments and the Georgia Constitution was violated by the prosecution's failure to prove an essential element of its case against Petitioner and by the Supreme Court's affirmance of his convictions based on matters outside the record.

FINDINGS OF FACT

In Nelson v. State, supra, the Supreme Court made the following finding of fact:

> "Forensic evidence established that a hair found on the victim could have come from the appellant's arm, but could not have come from the arm of the appellant's roommate, Alphonso Swinton."
>
> 247 Ga. at 173.

In Division 19 of Nelson v. State, supra, the Court found as follows:

> "The trial judge did not err in admitting the evidence concerning Alphonso Swinton. The evidence introduced included proof that the hair found on the victim could have come from the appellant's arm, but could not have come from Swinton's arm. Swinton was the appellant's roommate. In order for the state to prove its case against the appellant, it was necessary for the state

> to exclude the possibility that Swinton, who also had access to the murder weapon, could have committed the murder. The evidence concerning Swinton was, therefore, relevant to the issue of the appellant's guilt or innocence of the murder charge."
>
> 247 Ga. at 177-178.

A reading of the entire transcript indicates that the hair sample from Alphonso Swinton was never admitted into evidence.

In a colloquy outside the presence of the jury during a luncheon recess, the prosecutor stated that the hair found on the victim could not have come from Alphonso Swinton. (See Tr. 268-269).

Testimony was presented that hair samples had been taken from Swinton and turned over to the microanalysis expert at the State Crime Lab. (Tr. 332-334).

When the prosecutor attempted to question this expert about the hair sample from Swinton, defense counsel objected upon the ground that no connection had been made between Swinton and the case against Petitioner. (Tr. 340-341). The prosecutor did not tender the sample into evidence at that time, intending to link-up the evidence later. Id. However, this was never done and the hair sample evidence never became a part of the State's proof.

CONCLUSIONS OF LAW

The United States Supreme Court has explicitly held that "...the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397

U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The Supreme Court found that in order for the state to prove its case against Petitioner, the evidence of the hair sample from Swinton was necessary to exclude the hypothesis that Swinton could have committed the crime. The evidence of the hair sample, however, is outside the record. The Supreme Court apparently mistook some remarks as evidence in the record when, in fact, these remarks were made during a luncheon recess outside the presence of the jury. (Tr. 268-269). Thus, the Supreme Court used as a basis for affirming Petitioner's conviction upon circumstantial evidence a finding of evidence that was never presented to the jury. Cf. Smith v. Kershaw, 1 Ga. (1 Kelly) 259 (1846).

This Court agrees with the Supreme Court that without the evidence to exclude Swinton, the circumstantial evidence case against Petitioner does not satisfy the Jackson v. Virginia[1] standard of proof beyond a reasonable doubt.

The most fundamental concepts of Due Process demand that the Petition be granted and that Petitioner be given a new trial.

WHEREFORE, the argument in count 1 having been found meritorious, the Petition is granted.

This 7 day of June, 1982.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

---

[1] Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

GARY X. NELSON,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	CASE NO. 5387
WALTER D. ZANT, WARDEN	:	
GEORGIA DIAGNOSTIC AND	:	
CLASSIFICATION CENTER,	:	
	:	
RESPONDENT	:	

ORDER

The Court hereby amends the Order of June 2, 1982, nunc pro tunc, by striking the penultimate paragraph and inserting the following paragraph in lieu thereof:

"The most fundamental concepts of Due Process demand that the Petition be granted."

SO ORDERED, this 8th of June, 1982.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

FILED June 9 1982 at 9:30 A
CHIEF DEP
BUTTS SUPERIOR COURT

Exhibit C

38905. ZANT v. NELSON.

JORDAN, Chief Justice.

Nelson was convicted of the murder, aggravated sodomy, and rape of a 6-year-old girl in Chatham Superior Court. He received a death sentence for murder and consecutive life sentences for aggravated sodomy and rape. His convictions and sentences were affirmed on direct appeal: *Nelson v. State*, 247 Ga. 172 (274 SE2d

317) (1981), and certiorari was denied by the U. S. Supreme Court, 102 SC 365, 70 LE2d 192 (1981). Nelson subsequently filed a habeas petition pursuant to which he was granted relief on June 2, 1982.

Both Nelson and the state agree that circumstantial evidence was the basis of the conviction. Consequently, both agree that the state had the burden to prove every element of the crime beyond a reasonable doubt and to exclude every other reasonable hypothesis except guilt. Code Ann. § 38-109.

The relief granted by the habeas court was based on three premises: first, it found that we considered as evidence certain hair sample results which were never introduced into evidence; second, it found that we ruled that for the state to meet its burden, it had to exclude a hypothesis that Nelson's roommate, Alphonso Swinton, could have committed the murder; and third, it found that we ruled that the above hair sample results were necessary to exclude the hypothesis concerning Nelson's roommate. Consequently, the trial court concluded that the convictions could not stand since the evidence necessary for the state to meet its burden had never been made a part of the record.

The hair sample results in question concern forensic tests which compared a hair found on the victim to hair taken from both Nelson and Swinton. The tests comparing Nelson's hair to that found on the victim indicated that the hair on the victim could have come from Nelson, and these tests were introduced into evidence. The tests comparing Swinton's hair with that found on the victim were said to show that the hair on the victim did not come from Swinton. These latter results were never introduced into evidence; instead, the record shows only that remarks concerning these tests were made by the DA, defense counsel, and the judge during a luncheon recess outside the presence of the jury. Both Nelson and the state agree that these results were never introduced.

This Court acknowledges that in the statement of facts and in Division 19 of our opinion on Nelson's direct appeal, *Nelson v. State*, supra, that we erroneously recognized as admitted the tests concerning the comparison between the hair found on the victim and that taken from Swinton's arm. These test results were never in fact admitted into evidence.

This court's reference to Swinton's hair should have been raised on motion for rehearing. His failure to do so by motion for rehearing is not necessarily grounds for habeas corpus relief.

Our discussion of the hair sample results in Division 19 was in response to the technical question of whether these results and other testimony concerning Swinton were admissible. We found the results to be admissible as relevant to the question of whether the state had

excluded the hypothesis that Swinton could have committed the murder. In this division, we ruled, and both parties agree we did so correctly, that for the state to meet its burden of proof it had to exclude the hypothesis that Swinton could have committed the murder. However, we did not rule that the hair sample results were necessary to exclude Swinton; we merely stated that, for this purpose, the comparison of the hair samples was relevant.

Instead, Division 18 of the opinion deals with the question of whether, pursuant to Code Ann. § 38-109, the state excluded every reasonable hypothesis except that of guilt. Division 19 did not deal with this issue. As we recognized that the hair sample results in question had been admitted, we must assume that these results were considered as evidence when we, in Division 18, found that the jury properly found that the state had excluded all reasonable hypotheses except that of guilt. Consequently, we need to again review the record to determine if there is other sufficient evidence to support Nelson's conviction on circumstantial evidence.

The jury, by rendering its verdict, found that the state had excluded all reasonable hypotheses except that of guilty, *Campbell v. State*, 240 Ga. 352 (1) (240 SE2d 823) (1977), and it should be noted that the jury, in making this finding did not have before it the tests comparing Swinton's hair with that found on the victim. On review, the question now becomes whether there is sufficient evidence to support the jury's finding that the state had excluded the hypothesis that Swinton could have committed the murder. See *Harris v. State*, 236 Ga. 242 (1) (223 SE2d 643) and *Sabel v. State*, 248 Ga. 10, 16 (282 SE2d 61) (1981). If there is sufficient evidence, then "the appellate court will not disturb that finding, unless the verdict of guilty is unsupportable as a matter of law." *Harris v. State*, supra, p. 245.

Though some of the testimony and evidence presented is contradictory (see the statement of facts set forth on the direct appeal, *Nelson v. State*, 247 Ga. 172), "[t]he weight and credibility to be given the testimony of witnesses is in the exclusive province of the jury." *Wallace v. State*, 248 Ga. 255, 259 (282 SE2d 325) (1981), and it must be remembered that in circumstantial evidence cases " 'It is not necessary for the state to prove that it was impossible for the offense to have been committed by anyone else. . . .' " *Anglin v. State*, 244 Ga. 1, 6 (257 SE2d 513) (1979).

We find that the evidence was sufficient for the jury to find that the last time Valerie Armstrong was seen alive she was at Nelson's residence at a time that he was also present; that Swinton had moved out of the residence some five to six weeks prior to the murder and did not subsequently frequent Nelson's residence (Nelson stated that it had been two or three weeks since Swinton had come by); that the

hair found on the victim was consistent with and could have come from Nelson (the state's microanalyst testified that in addition to Nelson at least 120 or more people in the Savannah area could have hair similar to that found on the victim); and that the knife used to kill the victim came from the defendant's home.

After viewing all the evidence in a light most favorable to the prosecution, we find that the evidence is sufficient to have authorized the jury to find that the state excluded the possibility that Swinton would have committed the murder and to have authorized any rational trier of fact to find Nelson guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979); Code Ann. § 38-109.

Next, Nelson contends that his due process rights were violated by this Court's consideration of evidence outside the record when affirming his conviction on direct appeal.

Nelson argues that the concept of due process mandates that all evidence used against a defendant shall come from the witness stand in the courtroom so that there can be full protection of his rights of confrontation, of cross-examination, and of counsel. Turner v. Louisiana, 379 U. S. 466, 472 (85 SC 546, 13 LE2d 424) (1965). He argues that if the hair sample results concerning Swinton had somehow been communicated to the jury without affording Nelson the above rights that such conduct would have required his conviction be set aside. Davis v. Alaska, 415 U. S. 308 (94 SC 1105, 39 LE2d 347) (1974); Pointer v. Texas, 380 U. S. 400 (85 SC 1065, 13 LE2d 923) (1965). Although, in this case it was the appellate court, and not the jury, which considered evidence outside the record, Nelson argues that the mistake is nevertheless a constitutional error of great magnitude.

We find no prejudice to the defendant as on appeal we can now disregard the hair sample results concerning Swinton and re-review the record to determine if the jury was authorized to find that the state had met its burden, and Nelson, as he has done, can re-argue the sufficiency of the evidence. By this method, we can assure the defendant of a fair and thorough appellate review of his conviction and sentence.

For this same reason, we find meritless Nelson's contention that this Court violated the Eighth and Fourteenth Amendments by failing to provide the high standards of review demanded by those amendments in death penalty cases.

Judgment reversed. All the Justices concur.

Decided October 28, 1982.

Habeas corpus. Butts Superior Court. Before Judge Crumbley.

Michael J. Bowers, Attorney General, Charles E. Brown, Assistant Attorney General, Michael S. Bradley, for appellant.

Trotter, Bondurant, Miller & Hishon, Emmet J. Bondurant, Donovan, Leisure, Newton & Irvine, Richard H. Sayler, Allan R. Freedman, for appellee.

CONSTITUTIONAL AND STATUTORY AUTHORITIES INVOLVED

The Constitution of the United States of America, amendment V:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

The Constitution of the United States of America, amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The Constitution of the United States of America, amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Constitution of the United States of America, amendment XIV, section 1:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ga. Code Ann. § 9-11-60(h) (formerly Ga. Code Ann. § 81A-160(h)) (relief from judgment):

> Law of the case rule. The law of the case rule is abolished; but generally judgments and orders shall not be set aside or modified without just cause and, in setting aside or otherwise modifying judgments and orders, the court shall consider whether rights have vested thereunder and whether or not innocent parties would be injured thereby; provided, however, that any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.

Ga. Code § 24-4-5 (formerly Ga. Code Ann. § 38-110)

(reasonable doubt):

> Whether dependent upon direct or circumstantial evidence, the true question in criminal cases is not whether it is possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence to satisfy the mind and conscience beyond a reasonable doubt.

Ga. Code § 24-4-6 (formerly Ga. Code Ann. § 38-109)

(circumstantial evidence):

> To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

NO. 82-6108

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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GARY X. NELSON,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel of Record

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Senior Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
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QUESTION PRESENTED

Whether the Georgia Supreme Court properly concluded that under the facts of this case there was sufficient circumstantial evidence to support the Petitioner's convictions beyond a reasonable doubt?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 3

REASON FOR NOT GRANTING THE WRIT

THE STANDARD OF PROOF NECESSARILY REQUIRED TO SUPPORT A CRIMINAL CONVICTION IS WELL ESTABLISHED, AND SAID STANDARD HAS BEEN MET IN THE PETITIONER'S CASE 7

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Cases Cited	Page(s)
Glasser v. United States, 315 U.S. 60 (1942)	8
Holland v. United States, 348 U.S. 121 (1954)	8
Holt v. State, 247 Ga. 648, 278 S.E.2d 390 (1981)	8
Holt v. United States, 218 U.S. 245 (1910)	8
In Re Winship, 397 U.S. 358 (1970)	8
Jackson v. Virginia, 443 U.S. 307 (1979)	8, 9
Jones v. State, 247 Ga. 268, 257	8
Leland v. Oregon, 343 U.S. 790 (1952)	8
McConnell v. State, 235 Ga. 366, 220 S.E.2d 5 (1975)	8
Miles v. United States, 103 U.S. 304 (21981)	8
Nelson v. State, 247 Ga. 172, 274 S.E.2d 317 (1981), cert. denied, 454 U.S. 882 (1981)	1, 8, 9
Nelson v. Zant, Case No. 5387 (Butts County Superior Court, June 8, 1981)	2
Pinson v. State, 235 Ga. 188, 219 S.E.2d 125 (1975)	8
United States v. Bell, 678 F.2d 547 (5th Cir. 1982)	8
Wrisper v. State, 193 Ga. 151, 17 S.E.2d 714 (1941)	9
Zant v. Nelson, 250 Ga. 152, 296 S.E.2d 590 (1982)	2, 9, 20

Statutes Cited:

O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7)	1
O.C.G.A. § 24-4-6; Ga. Code Ann. § 38-109	9

PART ONE

STATEMENT OF THE CASE

On October 3, 1979, the Chatham County Grand Jury returned indictments against Petitioner Gary X. Nelson for the February 19, 1978 murder, aggravated sodomy and rape of Valerie Armstrong, a six year old child. (R. 7-9). Petitioner was tried on February 27-29, 1980, and convictions were obtained by the state on all three charges. (T. 670). The jury returned a recommendation for the death penalty, finding a statutory aggravating circumstance under O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7), to wit: the murder of Valerie Armstrong had been outrageously or wantonly vile, horrible and inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim. Petitioner received consecutive life sentences following his convictions for aggravated sodomy and rape. (T. 680-681).

Petitioner's convictions and sentences were affirmed by the Georgia Supreme Court on direct appeal, and his initial petition for writ of certiorari to this Court was denied. Nelson v. State. 247 Ga. 172, 274 S.E.2d 317 (1981), cert. denied, 454 U.S. 882 (1981). (See Petitioner's Exhibit A).

Following the affirmance of Petitioner's convictions and sentences on direct appeal and the denial of certiorari by this Court, Petitioner filed an application for state habeas corpus relief in the Superior Court of Butts County, Georgia. By agreement of counsel, only one of the twenty-two issues presented to the Butts county court was initially considered. This issue pertained to the sufficiency of the evidence and whether or not the Petitioner had been denied due process because the Georgia Supreme Court, in its original review of Petitioner's case on direct appeal, had considered evidence not actually in the record. The state habeas court found that the Georgia Supreme Court had mistakenly considered information

which had not been placed into evidence and as a result thereof, the habeas court granted relief, finding the evidence insufficient as a matter of law. Nelson v. Zant, Case No. 5387 (Butts County Superior Court, June 8, 1981). (See Petitioner's Exhibit B).

The Respondent then appealed the decision of the Butts County Superior Court to the Georgia Supreme Court. The Georgia Supreme Court, in its second review of the Petitioner's case, admitted that on direct appeal it had erroneously considered the results of certain tests comparing a hair found on the victim with a known sample from Petitioner's former roommate, Alphonso Swinton. This test was not actually admitted into evidence at Petitioner's trial. Zant v. Nelson, 250 Ga. 152, 153, 296 S.E.2d 590 (1982).

The Georgia Supreme Court then reevaluated the sufficiency of the evidence, excluding the evidence pertaining to the particular hair sample comparison. Even excluding this information, the Georgia Supreme Court still concluded that the circumstantial evidence was sufficient to support Petitioner's convictions beyond a reasonable doubt. Zant v. Nelson, supra, at 154-155. The Georgia Supreme Court's decision was rendered on October 28, 1982. (See Petitioner's Exhibit C). Thereafter, this instant petition for a writ of certiorari was filed under 28 U.S.C. § 1257(3) seeking review of the Georgia Supreme Court's decision in Zant v. Nelson, supra.

PART TWO

STATEMENT OF THE FACTS

The victim in this case, Valerie Armstrong, was a six year old child who resided with her mother and stepfather in Savannah, Georgia. (T. 197, 203-204, 208). Petitioner was a neighbor and knew Valerie as one of the neighborhood children who ran errands for the tenants in his building. (T. 180-181, 184, 204-205).

On the morning of Sunday, February 19, 1978, Petitioner began working on an automobile which was located behind his residence. At approximately ten o'clock that morning Petitioner visited Valerie's home in order to borrow a tool to work on the automobile. He and Valerie's stepfather talked for some time, and then her stepfather agreed to assist Petitioner with his automobile repairs. (T. 180, 204-205, 432, 565-568). At approximately 5:30 p.m. on February 19th Petitioner completed the initial work on the car with the help of Valerie's stepfather. (T. 182-183). Petitioner and Valerie's stepfather then returned to the victim's home where they again conversed for awhile. Before Petitioner left Valerie's house her stepfather pointed her out while she was playing outside with some neighborhood children. Petitioner responded, "Yeah, I know, that's my little buddy, because she comes down to the house all the time to go the store for us." (T. 284).

Petitioner then returned to his house to continue to work on his automobile. Finding insufficient light for his work, he ignited a fire by which to see. (T. 436-437, 483, 486). The victim's stepfather noticed that Petitioner had started the fire and sent his son, Michael, to Petitioner's house to inquire as to whether Petitioner wanted to use his drop cord light. (T. 185, 218, 221). When Michael received no answer after knocking on Petitioner's front door he went to the backyard of the house, but Petitioner was not to be found. (T. 221).

By 7:00 o'clock p.m. young Valerie had not returned home. Her concerned stepfather organized his other children and scouted the neighborhood looking for her, but she could not be located. (T. 186).

The person who testified as to the last sighting of Valerie Armstrong on February 19, 1978, was Sabrina Williams, a playmate of Valerie's. At the time of trial Sabrina was ten years old (T. 297). Sabrina last saw Valerie just before dusk. Sabrina stated that she and Valerie had been playing and then had gone to the store. As they were returning from the store, Valerie said that she was going to her "uncle's" house. (T. 302-304, 308). According to Sabrina, Valerie then walked toward the backyard of Petitioner's house. As Valerie and Sabrina parted company at Petitioner's house, Sabrina noticed Petitioner Nelson working on his blue Volkswagen automobile in the yard. (T. 305-306, 311-314).

Fredericka Armstrong, Valerie's sister, came to Sabrina Williams' house to inquire about Valerie's whereabouts. Unfortunately, Sabrina did not think it important enough to tell her sister that they had been to the store, and that Valerie had stopped at Petitioner's house on the way back. (T. 308-311). As a result of Valerie's family being unable to locate her, a missing persons report was filed with the Chatham County Police Department. (T. 186-187, 228-229). An initial police search of the nearby swampy wooded area in th vicinity of the victim's neighborhood conducted during the evening of February 19, 1978, proved to be unproductive. (T. 231-232). However, at approximately 3:00 o'clock p.m., on February 20, 1978, the police finally located the body of Valerie Armstrong. (T. 233).

When Valerie's body was found, her clothes were disarrayed, the slip she was wearing protruded outside her partially zipped pants, and there was evidence that she had been stabbed to death. A broken knife handle wrapped in masking tape and a knife blade were found near the body. There were also blood

spots between the body and a nearby ditch, as well as blood spots on a leaf of a nearby tree. (T. 233, 235, 243, 245-248, 379).

The autopsy which was later performed on Valerie Armstrong established that the child had been horribly attacked. (T. 294-296). Her vagina and rectum were severly bruised, there was heavy bleeding and both the vagina and rectum area were widely stretched. The skin between the vagina and rectum was torn, the victim's lips were also torn, and there was a mixture of seminal fluid and blood found in the anus and the victim's vagina. (T. 291-295). The pathologist gave his medical opinion that Valerie Armstrong had been brutally raped, anally sodomized, and probably orally sodomized. (T. 294-296). The pathologist's examination of Valerie's body also revealed bruises around the neck and multiple, superficial, shallow stab wounds on the right side of the chest. (T. 293). These shallow stab wounds were indicative of someone stabbing the victim lightly, either before or after the fatal stab wound in the left side of the chest. (T. 293, 295). Evidence showed that a stab wound to the left chest and lung caused Valerie to bleed to death, the death taking approximately thirty minutes to ensue. (T. 293-295).

Two days after Valerie's disappearance her stepfather received an early morning telephone call from the Petitioner during which he stated, "Yeah man, I know who killed your daughter," When Valerie's stepfather inquired of him as to how he knew who had killed his daughter, Petitioner said that it had been a fellow on the east side by the name of Blue. Petitioner then stated, "I can't tell you no more, cause I don't want to get involved." He then hung up the phone and the victim's stepfather thereafter reported the phone conversation to the police. (T. 188-190, 391-391). The police investigation of this lead revealed that the person nicknamed "Blue" was not a viable suspect. (T. 391-391)

During their investigation the police talked with Sabrina Williams and learned that Valerie had last been seen going into the backyard of the Petitioner's house. Three days after Valerie's disappearance Sabrina identified Petitioner from a photographic lineup as being the individual she had seen with Valerie shortly before Valerie's disappearance. (T. 312-315, 325-330). Included in the picture lineup was a photograph of Petitioner's former roommate Alphonso Swinton. (T. 282).

Petitioner Nelson apparently learned that he was a prime suspect in the disappearance and killing of Valerie Armstrong, and he voluntarily went to the police station. Even prior to being advised of his rights, he made certain contradictory statements which suggested a defense of alibi. (T. 423-507). He also consented to giving blood and hair samples. (T. 476-477). Petitioner's hair sample was later determined to be similar to a hair sample found in the victim's vagina. (T. 339-342). Petitioner's blood type (Type O) matched the typing of the seminal fluid stains found on the victim. (T. 363-365).

Petitioner repeatedly denied ownership of the knife found near Valerie's body, but this testimony was refuted by Patricia Brown, a female acquaintance of Petitioner's, and former girlfriend of Alphonso Swinton. (T. 346-350, 355-356, 493). Specifically recalling the taped handle, she positively identified the knife as the one she had used to cut chicken when she went to Petitioner's house to cook for him. (T. 346-350, 353-356).

Contradictory testimony was given by Petitioner's girlfriend, Diane Knight. Ms. Knight testified that the knife found near the victim's body was not the knife which belonged to the Petitioner. (T. 524-528). However, the State in rebuttal called a police sergeant who testified that he had several conversations with Ms. Knight concerning this case. He testified that in those conversations Ms. Knight told him the following things. First, she stated that she had seen the

knife in question at the Petitioner's home. (T. 604). Second, she told the police officer that in a conversation she had with the Petitioner, he had told her not to identify the pictures of the knife the police would show her. She stated that she asked Petitioner "Why?", but he would not answer that question. (T. 603, 607). Finally she told the police officer that she had been with Petitioner Nelson all day on February 19, 1978 (T. 619-610).

Petitioner, in his testimony, stated that at approximately 7:00 o'clock p.m., when it became dark while he was working on his automobile in his backyard, he left his house and rode a bus to the home of Dennis Lonon. (T. 571). Petitioner denied ever having seen the victim on February 19, 1978. (T. 570-52). He stated that after he returned from Lonon's house he continued to work on his car, and then went to a local convenience store looking for a person who owed him some money. (T. 572-576-577). Petitioner denied ever seeing the knife found near the victim's body. (T. 574-575). He also denied having any conversation with Valerie's stepfather, as well as denying any knowledge or implication in the killing of Valerie Armstrong. (T. 580-581).

Additional facts as necessary for a more complete discussion of the issue presented will be recited during the following portion of this brief.

PART THREE

REASON FOR NOT GRANTING THE WRIT

THE STANDARD OF PROOF NECESSARILY REQUIRED TO SUPPORT A CRIMINAL CONVICTION IS WELL ESTABLISHED, AND SAID STANDARD HAS BEEN MET IN THE PETITIONER'S CASE.

Petitioner's argument essentially asserts that the writ of certiorari should be granted in this case to review the

sufficiency of the evidence supporting Petitioner's convictions for the murder, aggravaged sodomy, and rape of a six year old child. Of course, it has long been held that the Constitution requires that in a criminal case, guilt of an accused must be established by proof beyond a reasonable doubt. See Miles v. United States, 103 U.S. 304 (1881); Holt v. United States, 218 U.S. 245 (1910); Leland v. Oregon, 343 U.S. 790 (1952); In Re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, 443 U.S. 307 (1979).

In Holland v. United States, 348 U.S. 121 (1954), this Court expounded that the same standard of appellate review should be applied both to circumstantial and direct evidence cases. (Id. at 139-140.) When the evidence is viewed in a light most favorable to the government, it must be sufficient to convince a reasonable trier of fact that the evidence establishes the defendant's guilt beyond a reasonable doubt. Glasser v. United States, 315 U.S. 60 (1942); Jackson v. Virginia, supra; United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982).

However, while following the aforesaid, the State of Georgia also imposes an additional requirement in circumstantial evidence cases. Not only must the evidence be sufficient to establish the defendant's guilt beyond a reasonable doubt, but also, "To warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothsis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." O.C.G.A. § 24-4-6; Ga. Code Ann. § 38-109; Nelson v. State, supra, 247 Ga. at 177; Holt v. State, 247 Ga. 648, 650, 278 S.E.2d 390 (1981); Jones v. State, 247 Ga. 268, 269, 257 S.E.2d 67 (1981). Under Georgia law it is not necessary for the State to prove that it was impossible for the offense to have been committed by anyone else or that it might not by bare possibility have been done by another. Pinson v. State, 235 Ga. 188, 190, 219 S.E.2d 125 (1975); McConnell v. State, 235

Ga. 366, 220 S.E.2d 5 (1975). The term hypothesis as used in O.C.G.A. § 24-4-6; Ga. Code Ann. § 38-109 simply refers "to such reasonable inferences as are ordinarily drawn by ordinary men in light of their experience in every day life." Wrisper v. State, 193 Ga. 157, 164, 17 S.E.2d 714 (1941).

Petitioner's case does not present a unique question of law or even a situation where the Georgia Supreme Court has deviated from its prior rulings or from established federal constitutional standards. At most, this case presents a question of whether the Georgia Supreme Court reached the proper conclusion upon applying the aforesaid standards to the particular facts of this case. In light of the available, alternative means for examining this issue by way of federal habeas corpus, Respondent respectfully submits that the extraordinary remedy of the writ of certiorari is neither justified nor warranted.

Alternatively, Respondent's position in opposition to the writ is further supported by a review of the evidence. Of course, as noted previously, the evidence must be viewed in a light most favorable to the state. Jackson v. Virginia, supra. Petitioner stresses the error made by the Georgia Supreme Court in its initial consideration of the sufficiency of the evidence in Nelson v. State, supra. Although he argues that in its initial opinion the Georgia Supreme Court found that the omitted hair comparison was necessary to exclude Petitioner's roommate, Alphonso Swinton, as a possible suspect, and thus was necessary to support Petitioner's conviction beyond a reasonable doubt; this was not the interpretation that the Georgia Supreme Court gave to its previous ruling. See Zant v. Nelson, supra, 250 Ga. at 153-154. The Georgia Supreme Court specifically stated in Zant v. Nelson that its prior opinion in Nelson v. State, merely said that it was necessary for the State to exclude the hypothesis that Swinton committed the crime in order to carry its burden in the case. A proposition which was recognized by the State at trial. The

court in Zant v. Nelson held that its prior opinion did not state that the hair sample evidence was necessary to exclude the hypothesis that Alphonso Swinton committed the crime. It merely stated that the evidence was relevant. Zant v. Nelson, supra, at 154. The court then reevaluated the evidence to determine its sufficiency. Id.

The evidence in this case shows the following relevant circumstances. The last time the victim was seen alive she was located at Petitioner's residence at a time when the Petitioner was also present. (T. 305-306, 311-314). The victim was known to the Petitioner and often ran errands for him. (T. 184). No one other than the Petitioner lived at the residence on February 19, 1978, the day the victim disappeared. Specifically, Petitioner's former roommate, Alphonso Swinton, had moved from that residence five weeks earlier. (T. 426, 573-574). In fact, Petitioner stated that Swinton had not even been by his former residence for at least two or three weeks prior to the murder of Valerie Armstrong. (T. 427). There was no evidence whatsoever that Swinton was at or near the residence on February 19, 1978. Sabrina Williams, the last person to see Valerie Armstrong alive, saw only the Petitioner. (T. 305-306, 311-314). A photograph of Swinton was included in the photographic lineup from which Sabrina Williams ultimately picked out the Petitioner. (T. 282). Although Petitioner has offered the alternative hypothesis that perhaps Swinton committed the murder, it is clear that the jury found that hypothesis was unreasonable and unjustified.

Additionally, the murder weapon was identified as coming from the Petitioner's home. (T. 346-350, 353-356, 604). Petitioner had told at least one witness not to identify the pictures of the knife that the police would show to the witness, and he would not explain why he wanted her to lie. (T. 603, 607). Petitioner's blood type matched the type of the seminal fluid stains found on the victim, (T. 363-365), and a hair sample found in the victim's vagina area was similar to

a known hair sample from the Petitioner. (T. 339-342). There was also testimony that the Petitioner called the victim's stepfather and attempted to throw suspicion upon another individual whom, as later investigation revealed, was not a viable suspect. (T. 188-190, 391-391).

In conclusion, Respondent submits that when the totality of the evidence is viewed in a light most favorable to the state, it amply demonstrates Petitioner's guilt beyond a reasonable doubt so as to comply with constituional standards. Thus, this Court should find no merit to Appellant's argument urging issuance of the writ in this case.

CONCLUSION

For all of the above and foregoing reasons, it is respectfully submitted that the petition for writ of certiorari in the present case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, NICHOLAS G. DUMICH, attorney of record for the Respondent, certify that I am a member of the Bar of the Supreme Court of the United States, and that in accordance with the Rules of the Supreme Court of the United States, I have this day served counsel for the Petitioner with a true and correct copy of this Brief for the Respondent in Opposition, by depositing a copy of same in the United States Mail, with adequate postage attached thereon and properly addressed to:

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This 4th day of March, 1983.

NICHOLAS G. DUMICH

Office - Supreme Court, U.S.
FILED
MAR 22 1983
ALEXANDER L. STEVAS
CLERK

MAR 25 PAGE 6

No. 82-6108

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GARY X. NELSON,

Petitioner,

v.

WALTER D. ZANT, Warden, Georgia Diagnostic & Classification Center,

Respondent.

PETITIONER'S REPLY

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TABLE OF AUTHORITIES

Cases:

Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978), rev'd on other grounds, Green v. Georgia, 442 U.S. 95 (1979) 3

Jackson v. Virginia, 443 U.S. 307 (1979) 2

Vachon v. New Hampshire, 414 U.S. 478 (1974) 2

Zant v. Nelson, 250 Ga. 152 (1982) 2

Statutes:

Ga. Code Ann. § 24-4-6 2

Ga. Code Ann. § 24-4-7 2

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WALTER D. ZANT, Warden, Georgia Diagnostic & Classification Center,

Respondent.

PETITIONER'S REPLY

Petitioner Gary X. Nelson submits this reply to Respondent's Brief in Opposition to the Petition for Certiorari.

1. Respondent mischaracterizes the issue presented in this case by asserting that Petitioner seeks review of "the sufficiency of the evidence supporting Petitioner's convictions" for murder, aggravated sodomy and rape. (Br. in Opp., p. 8). The general sufficiency of

the evidence was not in issue in either of the courts below and is not in issue here.* The principal issue presented by this Petition is whether there was sufficient evidence of record, under the standard of Jackson v. Virginia, 443 U.S. 307 (1979), to establish one element of the state's case-in-chief against Petitioner: Because the state's weak circumstantial evidence implicated both Petitioner and his one-time roommate, Alphonso Swinton, it was necessary for the state to negate, by evidence of record and beyond a reasonable doubt, that Alphonso Swinton committed the crimes. See Jackson v. Virginia, supra; Vachon v. New Hampshire, 414 U.S. 478 (1974); Ga. Code Ann. §§ 24-4-7;** Petition, pp. 14-16. There is no dispute here that the state was required, under Georgia law, to meet that burden with respect to Swinton. See Br. in Opp., pp. 8-9.***

2. The Petition establishes that the "proved facts" relied on by the Georgia Supreme Court in Nelson II do not

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* Indeed, the general sufficiency of the evidence to support Mr. Nelson's convictions is one of the issues that has been expressly reserved should further proceedings be required on Mr. Nelson's petition for habeas corpus in the Georgia courts. See, Petition p. 5.

** Ga. Code Ann. §§24-4-6 and 24-4-7 (formerly Ga. Code Ann. §§ 38-110 and 38-111) are quoted in full at p. 16, n.** of the Petition.

*** The Georgia circumstantial evidence statute provides that the record must be reviewed for "proved facts" which "shall exclude every other reasonable hypothesis save that of the guilt of the accused." As specifically applied in this case by the Georgia Supreme Court's holding below, this statute required review of the record to determine "whether there is sufficient evidence to support the jury's finding that the state had excluded the hypothesis that Swinton could have committed the murder." Zant v. Nelson, 250 Ga. 152, 154 (1982).

satisfy that standard, and that the Swinton hair sample, which the Court conceded had never in fact been introduced by the prosecutor at trial, was in fact the only "evidence" which could have satisfied the state's burden to negate Swinton. All of the judges connected with this case from trial through the present proceedings have recognized that the state's circumstantial case implicated both Swinton and the Petitioner. The prosecutor's plan at trial was to attempt to carry his burden of negating Swinton by introducing hair evidence, directed at Swinton and Swinton alone. For some reason, the hair "evidence" was never introduced. No amount of re-review of the evidence that was in fact introduced can supply the missing part of the state's case against Petitioner -- the utter lack of proof excluding Swinton.

3. Respondent's rehearsal of other evidence relating solely to Petitioner is simply beside the point because it does nothing to negate the reasonable hypothesis that Swinton was the perpetrator. Cf. Green v. State, 242 Ga. 261, 249 S.E.2d 1 (1978) (prosecution had duty to rebut reasonable hypothesis that defendant had stolen change allegedly linking him to the murder from an individual named by the defendant and discharged its duty by introducing that individual's testimony), rev'd on other grounds, Green v. Georgia, 442 U.S. 95 (1979). Nor can the state supply this missing proof by suggesting, in its Brief in Opposition, that the circumstantial evidence against Petitioner was strong. Aside from the fact that the circumstantial evidence here was extremely weak, such an argument is tantamount to claiming that a powerful circumstantial case renders the Georgia

circumstantial evidence statute inapplicable. All of the state courts which have considered Petitioner's case have specifically held that that statute applied here with full force to require the exclusion of Swinton.

4. The narrow issue presented on this Petition has been fully litigated in the state habeas corpus proceedings below. The facts and the law are clear; indeed, they are not in substantial dispute. We submit that this case is appropriate for summary reversal of the convictions by this Court by means of a per curiam opinion such as that issued below by Judge Crumbley, of the Superior Court of Butts County, Georgia, who granted Petitioner's application for a writ of habeas corpus.

Dated: March 12, 1983

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this Reply Brief upon respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first-class postage prepaid, addressed to:

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Done this 12th day of March, 1983.

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